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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	
	)	
	)	CS Docket No. 97-151
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	
	)	

COMMENTS

Adelphia Communications Corp., the Arizona Cable Telecommunications Association, the Pennsylvania Cable & Telecommunications Association and Suburban Cable TV Co. Inc. ("Commenters"), by their attorneys, respectfully submit these comments in the above-captioned rulemaking proceeding.

Commenters are cable television operators and associations representing television operators. They (or their member companies) either now offer telecommunications services or plan to do so in the foreseeable future. These comments address only those issues which are of particular interest to the Commenters.

Section 703 of the Telecommunications Act of 1996 ("1996 Act") amended Section 224 of the Communications Act of 1934 by creating a distinction between the rates paid for pole attachments used by cable systems solely to provide cable service and pole attachments used by cable systems or telecommunications carriers to provide telecommunications service. Amended Section 224 prescribes a new methodology for determining pole attachment rates for cable systems providing telecommunications service and for telecommunications carriers. The instant rulemaking is designed to implement the new methodology.

A. Attachment Space Use

The first set of questions posed by the Commission concerns the allowable use of attachment space. The Commission tentatively concludes that telecommunications carriers should be permitted to overlash existing lines with additional fiber. But then the Commission asks whether a carrier should be permitted to allow third parties to use the overlash facility and whether a cable system or telecommunications carrier should be permitted to allow a third party to use dark fiber in its original line and/or in its overlashed line. Finally, the Commission asks whether a third party should be permitted to overlash its own facility to an existing cable system or telecommunications carrier attachment.

Commenters believe that there are two basic principles contained in Section 224 which answer these questions. The first principle is that, with the caveat of safety considerations, cable systems and/or telecommunications carriers must be provided access to the poles and conduits belonging to privately owned utilities. The second principle is that a pole attachment is paid for under a statutory formula. Applying these principles to the overlash issues produces what Commenters believe are easy answers to the Commission's questions. Once a cable system has contracted to rent a foot of space to make a physical attachment to a pole it should make no difference whether it subsequently replaces its original plant with a new larger capacity line or it chooses to overlash existing lines with fiber optic plant. Moreover, for the same reasons that it is illegal for the utility whose pole plant is being leased to restrict or even inquire as to the content of the services being provided by the attaching party,[1] there should be no restrictions on the attaching party's use of its plant. Thus, a cable system should be permitted to allow a third party to use capacity on its plant.[2] Indeed, this policy should even

[1]See Marcus Cable Associates, L.P. v. Texas Utilities Electric Company, DA 97-1527, released July 21, 1997.

[2]In this regard, Commenters note for the record that the issue of unrestricted use has also arisen in the context of unregulated government and cooperative-owned poles. The Salt River Project, a large Arizona cooperative, has recently begun to deny cable operators access to poles

govern the situation where the attaching party wishes to permit a third party to overlash its own plant to the attaching party's wires. The overriding policy contained in Section 224 is that no restrictions should be put on an attaching party, the services it provides, or to whom those services are provided, so long as safety considerations are observed and the proper pole attachment rental rate is paid.[3]

B. Attachment Charge

1. Presumptions

The Commission next asks questions relating to several of the presumptions underlying the existing rate formula. Thus, issues are raised as to whether the average pole height of 37.5 feet should be changed, whether the 13.5 feet of usable space presumption should be changed, whether the presumed one foot of space occupied by cable should remain the same, and whether the safety space should continue to be attributed to the electric utility as part of the usable space on the pole. A white paper submitted by a group of electric utilities suggested that certain of these presumptions should be altered. The Commission also cites a suggestion by Duquesne Light Company that varying attachments place different burdens on the pole and therefore that any presumption ought to take into consideration factors such as weight and wind load.

Commenters reject the electric utilities' position that the average pole height is increasing but that the presumptive amount of usable space on the average pole is somehow decreasing. It may well be that the average height of poles has increased although Commenters believe that the reason for this relates more to the needs of electric utilities than to the demands of communications attachers. It should be noted that cable operators have shared the costs of the installation and maintenance of these higher poles. Contrary to the view of the utilities, Commenters submit that the presumptive usable

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bearing 69kV transmission lines. This is ostensibly for safety reasons, but there is no such safety code restriction that Commenters know of, and this new policy coincided with SRP's announcement that it intended to enter the business of offering dark fiber.

[3]Cf. Texas Utilities Electric Company v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

space on the average pole should increase if the size of the average pole increases because pole height correlates directly to usable space. The 13.5 foot of usable space on an average pole of 37.5 feet in height has its genesis in the FCC rulemaking implementing the 1978 Pole Act.[4] Thus, under the version of the National Electrical Safety Code ("NESC") in force at that time, a utility pole needed six feet of setting depth and 18 feet of minimum grade clearance for road crossings. This left 11 feet of usable space on a 35-foot pole and 16 feet of usable space on a 40-foot pole. Since it was presumed at that time that the average pole was 37.5-foot tall, an arithmetic average was used to derive the 13.5 feet of usable space presumption. Unless utilities can show that circumstances have changed regarding the measure of usable space on a pole, if the average pole height has increased to 40 feet, the Commission ought to change the usable space rebuttable presumption from 13.5 to 16 feet.

The principal basis for the utilities' argument that usable space should be decreased appears to be a rehash of the long-settled argument that usable space should exclude the neutral zone, i.e., that 40-inch distance prescribed by the NESC between a communications conductor and the first electrical conductor.[5] Commenters strongly support the Commission's tentative conclusion that the neutral zone is safety space which stems from a utility's requirement to comply with the NESC and therefore is properly assigned to the electric utility as part of its usable space.

Absolutely nothing has changed since 1979 to alter the conclusion that the entire neutral zone must be assigned to the electric companies' usable space.[6] The neutral zone exists so that an electric utility can place its attachments the NESC prescribed distance from all differing conductors. This space belongs to the power company for its own uses. Just as electrical conductors must be separated

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[4]See, Second Report and Order in CC Docket No. 78-144, 72 FCC 2d 59 (1979).

[5]Under the 1997 version of the NESC, the neutral zone is 40 inches but it may be reduced to 30 inches if the top communications facility and the electric facilities are bonded to a common ground.

[6]See Second Report and Order in CC Docket No. 78-144, supra, at 70.

from each other, so too must they be separated from differing conductors such as communication lines. Moreover, the neutral space can be put to revenue-producing uses by power companies since they utilize that space for street lights and other services.[7] In fact, power companies are now permitted to place communications cable in the neutral zone.[8]

Not only is there no basis for reducing the usable space presumption in the pole formula, but, on the contrary, there is a basis for increasing the usable space. In setting the original rate formula, the Commission utilized the NESC standard for minimum clearance above grade which was 18 feet at that time. However, the NESC was changed in 1990 to reflect that minimum space above grade for road crossings for communications cable is now 15.5 feet.[9] Therefore, if anything, the usable space presumption in the pole formula should be increased by a factor of 2.5 feet. (This is in addition to the increase in usable space caused by the increase in average pole height.)

Finally, Commenters point out that the argument made by Duquesne Light Company regarding the different burdens placed on a pole by varying attachments is contrary to Section 224 and would be, in any event, extraordinarily unworkable. Commenters would note, however, that if such a scheme were in place, the cable system attachment would pay a lower percentage of pole costs than it does now since its facilities are by far the smallest and lightest of all attachers.

2. Allocating the Cost of Unusable Space

The aspect of the 1996 Act which will cause pole attachment rates for entities providing telecommunication services to increase is the apportionment of the cost of space which is not usable, i.e., the portion of the pole set in the ground and between the ground and the first allowable attachment above minimum grade. The statute states that two-thirds of this cost must be allocated

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[7]Memorandum Opinion and Order in CC Docket No. 78-144, 77 FCC 2d 187, 191 (1980).

[8]NESC (1997), Sections 224A and 230F.

[9]NESC (1997), Table 232-1.

among all attaching entities. In order to implement this new provision, the Commission must decide what an attacher is and how to calculate the number of attachers. Questions in this regard include whether an entity which has overlashed its wires to an existing attachment or is using dark fiber within the initial attachment of another entity should be counted as an attacher for the purpose of allocating the cost of this unusable space.

The Commission has proposed that any telecommunications carrier, cable operator, or LEC attaching to a pole be counted as a separate entity for these purposes. The Commission also proposes that the cost of the unusable space should be apportioned equally among all such attaching entities. Commenters concur in these tentative conclusions. Commenters would have preferred that these costs be allocated among all attaching entities in the same proportion as the usable space but the amendments to Section 224 instruct otherwise.

The Commission goes on to tentatively conclude that if a utility is providing telecommunications service, it should also be counted as an attaching entity for purposes of allocating the cost of unusable space, and that an incumbent LEC with attachments on a pole should be counted for these purposes. Again, Commenters support these conclusions as a fair means of apportioning these costs.

The Commission asks how entities that have either overlashed to an existing attachment or are using dark fiber within the existing attachment of another entity should be counted for the purpose of allocating the cost of unusable space. Commenters believe that each attachment should be treated as a single attachment for cost allocation purposes. The number of entities which use each attachment and the content of what is put on the facilities should not enter into the equation. The idea behind Section 224 is that the owner of a pole or conduit is paid rent for the use of space on its facility. The formula in the statute looks first and foremost to the space occupied by an attaching entity. It does not ask whether the entity's attachment is fat or thin, coaxial or fiber, or what information is

transmitted on the facility. Thus, so long as the entity with a pole attachment contract observes all of the conditions of that contract and pays the requisite rental fee, the fact that a third party may have overlashed its facilities onto the initial attachment or utilizes dark fiber within the initial attachment should make no difference.

Finally, the Commission suggests that a pole-by-pole inventory of the number of entities on each pole would be costly and therefore that each utility should develop a presumptive average number of attachers on an average pole. Commenters concur in the concept of a presumptive average number of attachers. However, Commenters suggest that the Commission should develop an industry-wide rebuttable presumption just as it has done for the other elements in the existing pole rate formula. Allowing each utility to develop its own presumption will only cause unneeded litigation over this issue. All the Commission need do is look at the arguments about pole height and usable space presumptions to realize that utility-specific attacher presumptions would create an endless source of conflict.

3. Allocating the Cost of Usable Space

The second component of the rate formula for entities providing telecommunications services is an allocation of the cost of the usable space on a pole. The Commission proposes to use its current rate methodology modified to reflect only the costs associated with the usable space because it believes this methodology to be as applicable to telecommunications carriers as to cable systems. Commenters agree with the Commission's proposal in this regard. The Commission does, however, seek comment on the three principal components of the formula, i.e., the space occupied by the attachment, the net cost of a bare pole and the carrying charges.

As to the space occupied by the attachment, one foot of usable space per pole is assigned to cable systems' attachments. There is no reason to depart from this standard for cable systems when they provide telecommunications services or for that matter for other telecommunications providers.

A communications line is a communications line. The one foot of space derives from the clearance requirement between communications lines contained in the NESC. Indeed, Commenters would like to point out that the one foot of space which cable systems pay for is no longer even theirs on an exclusive basis. When most cable systems were constructed, they were required to use the side of a pole facing the street. This left the other side of the pole, that facing the yard or field, vacant. Many electric utilities are now permitting other communications entities to attach on the vacant side of the pole. This raises the question as to whether the assignment of the cost of a vertical one-foot of pole space to cable systems and/or other telecommunications providers is valid without considering the horizontal uses of the pole made by the pole owner.

As to the second component, the net cost of a bare pole, the Commission asks for comment on the possibility of using gross book costs instead of net book costs. As the Commission itself recognizes, even under such an approach not all costs can be calculated on a gross basis. Thus, the rate of return and income tax carrying charges will still have to be calculated using net book costs. In addition, a gross approach does not account for poles which are replaced at third party expense pursuant to make-ready requirements. Using a gross rate base, the pole formula would make cable operators, who are often the ones who have paid for these poles, pay again on poles that the utility has not paid to construct. There are a number of other reasons why use of the gross book costs of poles is improper, perhaps the most significant of which is that gross calculations tend to increase pole rental rates in almost every case.[10] This reason alone reveals the motivation behind the utilities' suggestion that such an approach be adopted.

[10]The ability to manipulate the investment and carrying charge data already permits some utilities to charge rates considerably above the average. A case in point is PECO Energy in Pennsylvania which has given notice that its attachment rate will exceed $10 in 1998, a rate which is at least $2.00 higher than any other regulated rate in the state.

As to the carrying charge element of the formula, Commenters defer to the critique offered by the National Cable Television Association in its comments in CS Docket No. 97-98.

The Commission seeks comment on the applicability of its formula to an entity which has overlashed to an existing attachment or is using dark fiber within the initial attachment of another entity. For the reasons set forth above in the context of counting the number of attachers to a pole, Commenters believe that the rate formula should be applied only to the entity which has an attachment agreement with the pole owner. Under these agreements, cable operators are permitted one attachment and are assigned one foot of space on the pole. Cable systems expect to pay an additional attachment fee if they make an additional attachment to the pole even though it may be within the assigned foot. This already overcompensates the pole owner. It would compound this injustice to apply the rate formula to an overlashed facility by the existing attacher or to an entity using dark fiber within the initial attachment of another entity.

As a final point, Commenters note that when the formula proposed in this rulemaking is adopted, it will be applicable to cable operators who provide telecommunications services over their facilities. However, in many cases these telecommunications services, at least initially, may not be provided throughout the franchise area. For example, cable operators may provide telecommunication services between specific points or just in portions of the franchise area. If a cable operator has a pole attachment agreement with a utility for poles throughout the franchise area, the cable operator should

not have to pay the higher telecommunications attachment rate for every pole in the system. Instead, the higher rate should only be applicable to those attachments where the attached facilities are carrying telecommunications service.

Respectfully submitted,

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